No. 14-1470

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Minnesota

SUPPLEMENTAL BRIEF FOR PETITIONER

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-7870

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, petitioner submits this supplemental brief to call the Court's attention to the recent decision of the Hawaii Supreme Court in *State of Hawai'i* v. *Yong Shik Won*, No. SCWC-12-0000858, 2015 WL 7574360 (Haw. Nov. 25, 2015), authority that was not available at the time of petitioner's last filing.

The petition for a writ of certiorari in this case, and the related petition in *Birchfield* v. *North Dakota*, No. 14-1468, present the question whether a person who is arrested on suspicion of driving while impaired may be required to submit to a warrantless chemical test of his or her breath, blood, or urine, and may be subjected to serious criminal penalties for refusing to take the test. In this case, the Minnesota Supreme Court held that such compelled tests of deep-lung air are permissible under the search-incident-to-arrest doctrine; in *Birchfield*, the North Dakota Supreme Court held that a defendant may be criminally punished for refusal to submit to a blood test performed in these circumstances on the theory that compelled consent is both reasonable and a valid condition on the grant of a driver's license.

In *Yong Shik Won*, however, the Supreme Court of Hawaii rejected all of these rationales. The Hawaii court there overturned the driving-while-impaired conviction of a person who was compelled to consent to a breath test by the threat of criminal penalties under a Hawaii test-refusal statute that is materially identical to the similar test-refusal laws of North Dakota and Minnesota.

Applying "[t]he right to be free of warrantless searches and seizures [that] is a fundamental guar-

antee of our constitution" (*Yong Shik Won*, 2015 WL 7574360, at *6) absent "'specifically established and well-delineated exceptions'" to the warrant requirement (*ibid.* (citation omitted)), the Hawaii court noted that a valid consent to a search must be the product of a "'free and unconstrained choice'" (*id.* at 22 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225-26 (1973) and that "'[a] suspect may of course delimit as he chooses the scope of the search to which he consents.'" *Ibid.* (quoting *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991)). The Hawaii court added that, "[w]here arrest, conviction, and imprisonment are threatened if consent to search is not given, the threat infringes upon and oppresses the unfettered will and free choice of the person to whom it is made, whether by calculation or effect." *Id.* at *14.

Against this background, where the defendant "had no other alternative to avoid prosecution for the refusal offense but to submit to the search," the Hawaii court found that consent to the search is "invalid as a waiver of [the defendant's] right not to be searched." *Yong Shik Won*, 2015 WL 7574360, at *16. The court added that a "balancing approach to determine reasonableness" is invalid absent a warrant or the presence of a recognized exception to the warrant requirement (*ibid*); that consent to search could not be required as a "condition of the privilege of driving on public roads" (*ibid.*); and that "[t]he search incident to arrest exception [to the warrant requirement] is also inapplicable as it is 'limited in scope to a search of the arrestee's person and the area within his immediate control from which he could obtain a weapon or destroy evidence.'" *Id.* at *6 n.23 (citation omitted). The Hawaii Supreme Court thus rejected each of the theories endorsed by the North

Dakota and Minnesota Supreme Courts in this case and in *Birchfield*.

In reaching its conclusion, the Hawaii Supreme Court purported to apply the search and seizure provision of the Hawaii Constitution, Haw. Const. Art. I, § 7. But that does not diminish the significance of the disagreement between the courts on the issue presented here. In relevant respects, this provision of the Hawaii Constitution and the Fourth Amendment of the U.S. Constitution have substantially similar language and an identical meaning. Thus, the Hawaii Supreme Court in *Yong Shik Won* repeatedly cited and relied upon Fourth Amendment decisions of this Court and of federal courts of appeals. See *Yong Shik Won*, 2015 WL 7574360, at *5-6 & n.23, *7, *11, *13 & n.29, *14 & n.33, *17, n.39, *18, *19, *20. And the concurring Hawaii Justice expressly recognized that the Hawaii compelled-consent statute "constitutes an unconstitutional abridgement of the right to be free from unreasonable searches and seizures" under both the Hawaii Constitution "*and* the fourth amendment to the United States Constitution." 2015 WL 7574360, at *33 (Wilson, J., concurring) (emphasis added); see *id.* at *34 (criticizing decision of the North Dakota Supreme Court in *Birchfield*); *id.* at *36 (citing decisions of this Court); *id.* at *38 (search in *Yong Shik Won* violates "the warrant requirement of the fourth amendment of the United States Constitution").

Accordingly, because the decision of the Hawaii Supreme Court in *Yong Shik Won* confirms that there is considerable uncertainty in the lower courts on the question presented here, and because that question is an important and recurring one, the peti-

tions for writs of certiorari in this case and in *Birchfield* should be granted.

Respectfully submitted.

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-7870

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

NOVEMBER 2015

* The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.